2003-62

>>> "John Quinn" <Quinj@law.ci.detroit.mi.us> 03/23/05 8:03 AM >>>
Mr. Davis:

Pursuant to Administrative Order 2003-62, I am commenting on proposed MRPC 1.5(e) and 1.11(c).

Proposed MRPC 1.5(e).

This rule addresses the division of a fee between lawyers who are not in the same firm. The Model Rule requires that the client agree to the arrangement, "including the share each lawyer will receive." One way in which the rule proposed by the Court differs from the Model Rule is omission of the requirement that the client agree to the apportionment of the fee. The proposed rule, like the current Michigan rule, does not even require that the client be informed of the share of the fee to be received by each lawyer.

I agree with the ABA that sharing of a fee among lawyers not in the same firm should be permitted only when the client is informed of and agrees to the apportionment of the fee.

¶ [7] of the Comment on proposed Rule 1.5 notes that Rule 1.5(e) applies most commonly to the division of a contingent fee between a referring lawyer and a trial specialist. In the negotiation of a retention agreement with a lawyer an individual client, especially one who lacks business and legal sophistication (as is often the case when the agreement in question is a contingent-fee agreement) is at a severe disadvantage. In such circumstances the retention agreement is almost always a contract of adhesion drafted by the lawyers. The lawyers, of course, know how to draft the agreement to maximize their own legal and economic advantage. The client must rely in large measure on the lawyers to protect and advance the client's interest in the drafting of the agreement, despite the fact that, with reference to the preparation of the agreement, the lawyers' interests clearly conflict with the client's.

Because of this inherent imbalance, reasonable efforts should be made in the Rules of Professional Conduct to protect the client. One way to do that is to enhance the client's bargaining power by requiring the lawyers to share with the client information that may be useful in evaluating the retention proposal. Model Rule 1.5(e)(2) appears to be based on the proposition that the allocation of the fee between the referring lawyer and the lawyer who will actually do the work is information that would be of value to the client and therefore should be shared with the client. The Court apparently disagrees, although the reason for proposing that Michigan reject this part of the Model Rule has not, so far as I know, been explained.

Perhaps the Court believes that information about the proposed apportionment of the fee would not be of value to the client: that a client who is informed of the services to be provided and how the fee for those services will be calculated has all the information needed to decide whether to pay that fee for those services. But in fact information about the apportionment of the fee would assist the client in determining whether she should bargain for a lower fee or shop around for another equally qualified or better qualified lawyer who might prosecute the claim for a lower fee. If the client were informed that the referring lawyer is receiving thirty to forty percent of the fee for doing almost no work, that is, essentially as a finder's fee (since Michigan also rejects the Model Rule's requirement that the division of the fee be proportional to the services performed), the client might reasonably conclude that the services offered by the trial lawyer could be had for less than the client is being asked to pay. This knowledge would enhance the client's bargaining power and ability to make an informed decision whether it would be wise to interview other trial lawyers before signing a retention agreement.

The Court may be concerned that information as to the apportionment of the fee would encourage the client to select a lawyer solely on the basis of cost without regard for the lawyer's qualifications to prosecute the claim effectively. But Rule 1.1 protects the client from being represented by a lawyer who is not competent to handle the matter. Once the requirement of basic competence is met the client should have the right to determine the relative importance of the cost and the quality of legal services in deciding whom to retain, and the lawyers ought not be permitted to restrain the exercise of that right by withholding information. Moreover, if the client does express an interest in shopping for a lower fee, the lawyers offering a contingent fee agreement that includes acknowledgment of a referral fee can be expected to provide ample information about the qualifications of the trial lawyer. The client is then able to consider both the proposed fee and the qualifications of the trial lawyer and make an informed judgment whether to enter into the retention agreement.

Finally, the Court may fear that increasing clients' bargaining power might adversely affect the economics of law practice, that is, reduce the income of some lawyers. This is at best a marginally valid concern. In the absence of evidence that referring cases has ceased to be economically viable in jurisdictions that have adopted the Model Rule (Even before Ethics 2000, the Model Rule required disclosure of the apportionment of the fee.), there is no reason to believe lawyers' standard of living is significantly reduced by such an increase in clients' bargaining power. On the other hand, the increased bargaining power would be illusory if it did not provide some advantage to clients and a corresponding detriment to lawyers. But those of us who make our living by providing legal services deserve no greater protection from the discipline of the free market than those who provide other goods and services. The providers of other services, for example, financial services, are required by government regulators to give consumers specified information in a specified form to enable the consumers to make informed decisions. See, for example, 12 CFR 226.1 et seq. We value our status as a largely self-regulating profession. As noted in ¶ [12] of the Preamble to the proposed rules and in the Comment to current MRPC 1.0, our self-regulation imposes "a responsibility to assure that [the profession's] regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar." The bar's interest in protecting and improving the economic circumstances of lawyers does not justify a failure to require that clients be given information that can assist them in negotiating retention agreements.

I suggest adoption of the following as MRPC 1.5(e):

> "A division of a fee between lawyers who are not in the same firm may be made only if:
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> "(1) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
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> "(2) the total fee is reasonable."

This proposal is much more permissive than the Model Rule, since it does not require that the fee be apportioned according to the work done by each lawyer nor that each lawyer retain responsibility for the representation. It merely requires that the client be informed of the apportionment of the fee to assist her in making an informed decision whether to enter into the retention agreement.

Proposed MRPC 1.11(c).

I will address two issues concerning this rule, which governs the use of confidential government information ("CGI") by a lawyer who has left the employment in which she obtained the information. First, I will suggest that the rule should apply to a lawyer who leaves one government post to assume a post with another government agency. Then I will respond to Marcia Proctor's comment on use of the "reasonably believes" standard.

The Model Rule, current MRPC 1.11(b) and proposed Rule 1.11(c) impose a limitation on the representation only of private clients by a lawyer who obtained CGI while in government service. I suggest expanding the scope of the rule to impose a similar limitation on a lawyer's representation of a government agency if the lawyer obtained CGI while employed by another government agency. I see no rationale justifying a distinction for this purpose between lawyers who leave government employment to represent private clients and those who leave to work for another government agency or who represent another government agency after entering private practice. For example, a lawyer who acquired CGI about a person while employed by the IRS should not be permitted to use that CGI for the benefit of a city or county that subsequently employs or retains her in circumstances where she could not use the CGI for the benefit of a private client. This is consistent with the proposed change to Rule 1.11(a)(2), which deletes "private" as a modifier of "client," and with ¶ [5] of the Comment on proposed Rule 1.11.

Ms. Proctor notes that the current MRPC 1.11(b) applies only to information a lawyer knows to be CGI. The Model Rule agrees with the current Michigan rule in this respect, but proposed Rule 1.11(c) would apply to any information the lawyer acquired while in government service unless the lawyer "reasonably believes, after diligent inquiry and careful consideration" that it is not CGI. Ms. Proctor prefers the current rule because she says a lawyer who has left government service is no longer able to conduct the diligent inquiry required by the proposed rule and because the proposed rule imposes a standard different from that applied to private practitioners in Rule 1.9(b). I disagree with Mr. Proctor and support this proposed change.

CGI is "information that has been obtained under government authority and which . . . the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public." Proposed Rule 1.11(c). The determination whether the government is forbidden to disclose or has a privilege not to disclose particular information generally is made by a fact-specific balancing of competing interests. See, e.g.: Kallstrom v City of Columbus, 136 F3d 1055 (6th Cir 1998), rehearing and rehearing en banc denied, 1998 US App LEXIS 10896 (whether substantive due process prevents disclosure of personal information about police officers depends the level of protection the specific information enjoys and a case-by-case balancing of the officers' privacy interest against the public's need for the information); Ostoin v Waterford Twp Police Dept, 189 Mich App 334 (1991) (scope of deliberative-process privilege determined by case-specific balancing of interests). It is, therefore, rarely possible to know whether particular information is CGI. Such knowledge would require completely confident prediction of how a court might later balance the competing interests. An obligation that applies only when the lawyer knows that the information is CGI is, in most cases, illusory. The proposed rule avoids an illusory prohibition by applying unless the lawyer reasonably believes after diligent inquiry and careful consideration that the information in question is not CGI. "Diligent inquiry" should be interpreted to require the lawyer to find out, to the extent reasonably possible, the facts affecting the confidentiality of the information. "Careful consideration" should be interpreted to require that the lawyer balance the competing interests. (It might be wise to discuss the interpretation of these terms in the Comment.)

When "diligent inquiry" is so understood, Ms. Proctor's concern that the term imposes an impossible burden evaporates. It is difficult to imagine a case in which a lawyer would have knowledge of information (Proposed Rule 1.11(c) applies only when the lawyer has actual knowledge of the information. See ¶ [8] of the Comment on proposed Rule 1.11.) without also having access to the facts needed to determine whether the information is CGI. If such a case were to arise, "diligent inquiry" would not require the lawyer to do the impossible, i.e., it would not require her to find out facts that are not available to her.

As to Ms. Proctor's other concern, there is no reason for Rule 1.11(c) to use the same standard as Rule 1.9(b) because the two rules deal with the use of different kinds of information in different circumstances. Rule 1.9(b) has nothing to do with CGI as such. It deals with information relating to the representation of a client. The application of Rule 1.9(b) to lawyers who formerly worked for the government is governed by proposed Rule 1.11(a)(1), not by Rule 1.11(c).

I suggest adoption of the following as MRPC 1.11(c):

"Except as law may otherwise expressly permit, a lawyer having information about a person acquired when the lawyer was a public officer or employee may not, after leaving the office or employment in which the lawyer acquired the information, represent a client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person unless the lawyer reasonably believes, after diligent inquiry and careful consideration, that the information is not confidential government information. As used in this rule, the term 'confidential government information' means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm or government law office with which that lawyer is associated after leaving the office or employment in which the lawyer acquired the information may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom."

This message is electronically signed.

John P. Quinn
P-23820